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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

OCTOBER TERM, 1941

No. 955

ALCHRIST GRANT (ALIAS POMPEY) AND CYRUS PINCKNEY, PETITIONERS,

versus

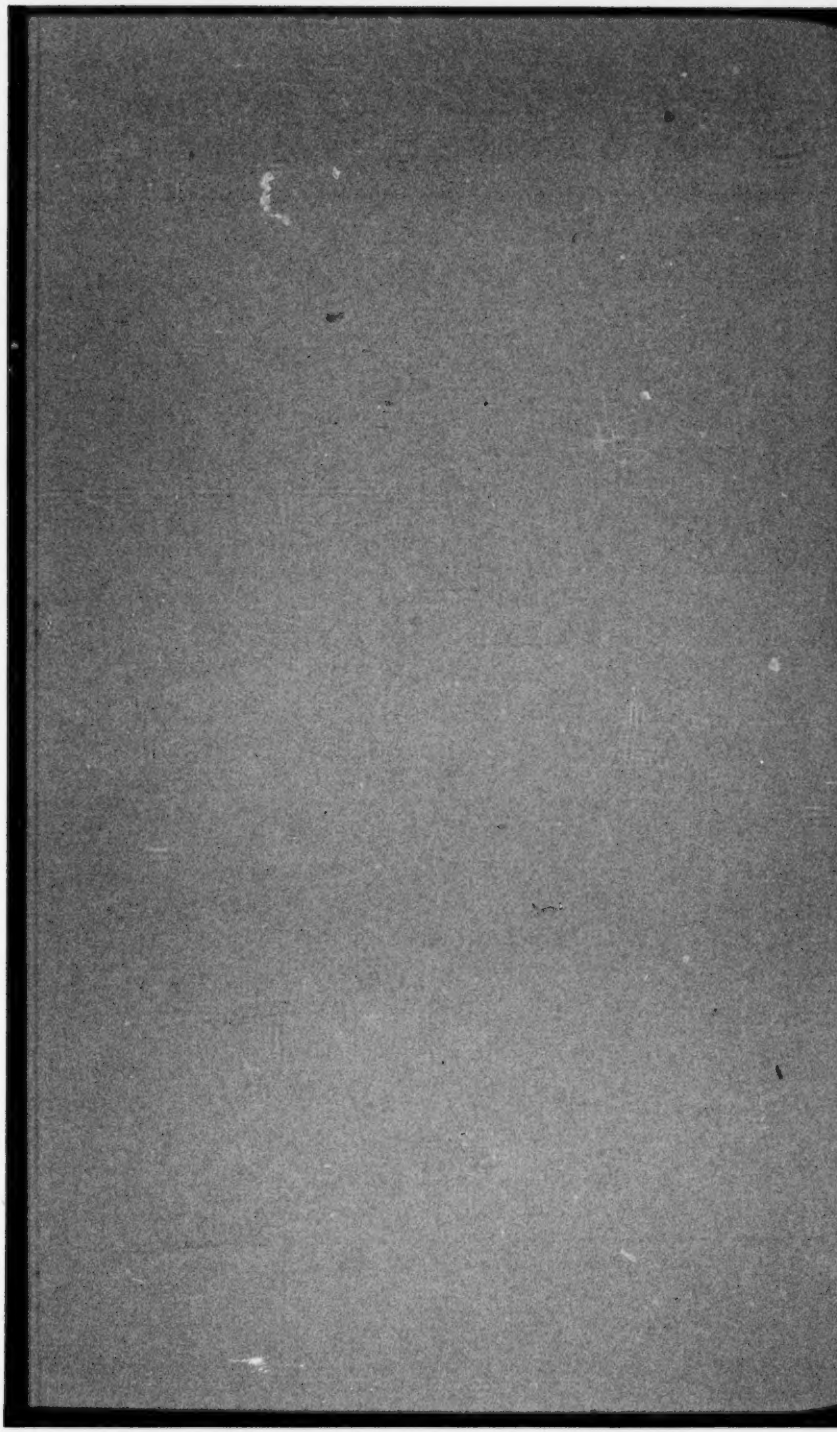
THE STATE OF SOUTH CAROLINA, RESPONDENT

JOHN M. DANIEL,
Attorney General of South Carolina.

ROBERT McC. FIGG, JR.,
Solicitor of the Ninth Judicial Circuit of South Carolina,
Attorneys for Respondent.

N. N. NEWELL,
Moncks Corner, S. C.,
Of Counsel.

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INDEX

	Page
Statement	1
Argument:	
I	10
II	13
III	16
Conclusion	18

TABLE OF CASES CITED

PAGE

Avery v. Alabama, 308 U. S., 444 15

Lane v. Wilson, 307 U. S., 268, 59 S. Ct., 872..... 13

Lisenaba v. California, —— U. S., ——, 62 S. Ct., 280... 18

Pierre v. Louisiana, 306 U. S., 354, 59 Ct., 536 13

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THE STATE OF SOUTH CAROLINA, RESPONDENT

STATEMENT

The petitioners were convicted in the Court of General Sessions for Berkeley County, South Carolina, upon an indictment charging assault with intent to ravish, and, since the verdict did not carry a recommendation of mercy, they were sentenced to death by electrocution. From this conviction and sentence, and from an order denying a motion for a new trial, they appealed to the Supreme Court of South Carolina. That Court considered on the merits all of the questions raised by the exceptions taken both to the conviction and sentence and to the order denying the motion for a new trial, and on November 18, 1941, filed a unanimous opinion affirming the judgment of the trial Court and the order on the motion. Subsequently, upon

proper petition, the Supreme Court stayed the remittitur in order to allow time for the filing of a petition for writ of *certiorari* in this Court.

The Supreme Court of South Carolina adopted in its opinion the statement of facts contained in the brief of the State in that Court, but, at the risk of repetition, this statement of facts, with the interlinear references, is set forth again for the assistance of the Court.

"STATEMENT

"On the evening of July 9th, 1940, Jessie Lee Cumbee, a young white girl of the age of 15 years, who lived at Awendaw in Charleston County, but was visiting her brother at North Charleston in that county, went with her brother's permission for an automobile ride with Thomas A. Mitchum, who was her escort, and Herbert Hodge and Dessie Miller. (R. 20, 21) They left the home of Miss Cumbee's brother at a little after 8 o'clock, drove in Mitchum's car to a filling station where they drank Coca-Colas, and then went to the reservoir of the West Virginia Pulp and Paper Company's plant where they parked. (R. 21) It was drizzling when they reached the reservoir, and they sat in the automobile about a half-hour, when Mr. Hodge and Miss Miller got out and went for a walk around the reservoir, leaving Mr. Mitchum and Miss Cumbee in the car. (R. 21)

"Shortly afterwards, another car drove up and stopped by the car in which they were sitting. A Negro man got out and came up to their car on the side on which Miss Cumbee was seated, and said that he thought it was Geneva's car. Mr. Mitchum told him that he better be sure next time. The Negro man turned and went back to the car out of which he had gotten, but the car did not move. Instead, two Negroes came back to the Mitchum car, one on the side on which Miss Cumbee was seated and the other on the driver's side on which Mr. Mitchum was seated. (R.

21) The man on the driver's side started hitting Mr. Mitchum over the head, striking him more than once, and he fell out of the car. Miss Cumbee got out and ran screaming around the edge of the reservoir, but the Negroes ran after her and grabbed her and put her in their car, which was a two seated car, a sedan. She was placed in the front seat, and one of the Negroes drove while the other sat in the back seat. (R. 22)

"Miss Cumbee asked them to take her home in North Charleston, and they said that they were taking her home, but did not do so. They drove through several woods roads, and finally stopped the car in a thicket, and took her out of the car. One of them threw her down and both of them forcibly assaulted her, after taking off part of her underclothing. After a time, she saw the headlights of another automobile coming through the woods, and one of the Negroes ran. The other took her further into the woods and hit her over the nose with some kind of a weapon and ran. (R. 23) She screamed and ran toward the approaching car, in which were two county policemen searching for her, and when she ran out into the road in front of the headlights she was bleeding from nose and mouth. (R. 29, 32) She was taken to the hospital and treated for her injuries and on the following day was examined by Dr. W. K. Fishburne. (R. 23)

"Dr. Fishburne testified that there was considerable fresh blood on her petticoat; that she was quite bruised; that the tube from the bladder, the urethra, was very much bruised and swollen; that the lips of the vagina looked like they had been handled by the hand; that the hymen had been ruptured and that an attempt had been made to enter her, but that the attempt had not succeeded because she was very much undeveloped; that there was no evidence that she had ever been handled in that way before, and that the injuries were recent enough for there to be fresh blood. (R. 24-27)

"The evidence showed that after Mr. Mitchum had been left lying on the ground, beaten about the head, he had made his way to the highway about two blocks away, and when he could not get any farther some people came in answer to his cries for help. (R. 12) The police radio station in Charleston received a call, and broadcast directions to a county police radio car to go to the scene. (R. 28, 31) In a few minutes the police car arrived at the reservoir, and followed the tracks of the Negroes' car, which tracks were visible in the dirt roads because it was wet from the earlier rain. (R. 15, 28, 32) When the tracks ended, the officers head a girl screaming, and she ran into the road in front of the headlights, bleeding from the nose and mouth, and was taken to the hospital. (R. 29, 32)

"The car was found in the thicket off the road, and since the keys were not in it, a wrecker was called to haul it in. (R. 32, 29, 50) The car was found and the assaults occurred in Berkeley County, about a mile north of the line between Berkeley and Charleston Counties. (R. 29, 33, 62)

"The automobile used by the Negroes proved to be registered in the name of Edward Grant (R. 44, 60), and he and his brother Alchrist Grant, one of the appellants, were arrested that night, each at his own home. (R. 44) When Alchrist Grant was arrested, his home was searched but no wet clothing (R. 39) except a wet hat (R. 44) was found, although the clothing of a person who had run through the woods that night had to be wet. (R. 39) It was not until after Pinckney's arrest that the police got from Grant's wife the wet clothing on information given by Grant. (R. 40) Edward Grant and Alchrist Grant were placed in the Berkeley County Jail on July 10th, the day after the assaults occurred. (R. 61)

"County Policeman Knight, at the request of the Berkeley County authorities, then made an investigation in the community for further evidence as to the identity of the Negroes involved in the attack. (R. 39, 40) As a result of this investigation, he located two

material witnesses, Edward Bailey and James Hilliard, two Negroes living in the locality. (R. 40) Bailey's testimony showed that on the night of July 9th, Alchrist Grant came to his home at about 10:30 or 11:00 o'clock, and knocked on his door and woke him; that Grant asked Bailey to get somebody to help him get home, as he had had a wreck and wanted to get home before the officers got him; that Bailey dressed and took Grant to the house of James Hilliard, whom they woke; that Grant asked Hilliard to take him home, and Hilliard said that he didn't have enough gas but would take him if he would get some gas; that Hilliard and Bailey drove Grant to his home at Liberty Hill in Hilliard's model T truck, about two and a half miles, and Grant gave Hilliard 50 cents, with which they bought a gallon of gas and some cigarettes. (R. 45, 46, 47) Hilliard's testimony corroborated that given by Bailey. (R. 47, 48)

"The officers brought first Hilliard and then Bailey to the Berkeley County Jail and confronted Alchrist Grant with them. (R. 40, 41, 42) As a result of this, Grant said that he was ready to tell the truth, and admitted his identity as one of the Negroes, and gave the officers the information upon which they arrested Cyrus Pinckney, the other appellant, and cast the whole blame on Pinckney. (R. 40)

"When Pinckney was arrested, he admitted his connection with the offense, and on the day after his arrest the appellants made statements in the presence of the Solicitor, Miss Waring, the Solicitor's stenographer, Sheriff Hill of Berkeley County, Mr. Finklea, Deputy Sheriff of Berkeley County, N. N. Newell, County Attorney of Berkeley County, Chief D. S. Mott of the Charleston County Police, and Officer Knight of the Charleston County Police. (R. 50, 51, 63, 65, 67, 73, 78) These statements were taken in the court room of the Berkeley County Court House (R. 51), being taken down on the typewriter by Miss Waring as made by the prisoner (R. 48, 56). Grant read over his statement himself and then signed it. (R. 51) Pinckney

could not read, but his statement was read to him by Mr. Newell and he confirmed it. (R. 56)

"The defendants were then brought into the court room together, and the statement made by each was read to the other. Pinckney, in the presence of Grant, repeated the facts to Grant as given in his statement, and every once in a while Grant would shake his head, and Pinckney would say 'Yes, you did,' and when he did this, Grant would not deny it. (R. 59, 64)

"Every witness present at the taking of the statements testified that they were freely and voluntarily made, that each defendant was warned that he did not have to make a statement, and that if he did make a statement it would be used against him. (R. 63, 51, 65-66, 67, 74, 78) There was no duress and no promises of any kind made to the defendants.

"These confessions were offered and received in evidence at the trial and over objections by the defendants' counsel, and were read to the jury. (R. 51-52, 57)

"The defendants remained in jail from the respective dates of their arrest until the October 1940 term of the Court of General Sessions for Berkeley County. Major J. D. E. Meyer of the Charleston bar was consulted by the family of Grant on the day after the crime occurred. During the period between July and the court term in October, he spoke to the Solicitor several times about the case (R. 3), and the confessions were made available to him.

"On the day before the term of court convened, Major Meyer stated to the Solicitor that he did not represent the men if the case was to be tried, and that he represented them only if a plea of guilty would be accepted by the State. The Solicitor informed Major Meyer that no plea of guilty would be accepted and that the case would be for trial on some day during the term. (R. 3) Major Meyer then stated that he had a civil case in the U. S. District Court at Charleston which would be for trial on one day in the same week, whereupon the Solicitor stated that he was satisfied

that the District Judge would arrange it so that the civil case did not conflict with this capital case. (R. 3) Thereupon Major Meyer repeated his statement that if the case were to be a trial and not a plea he would not and did not represent the defendants. (R. 3)

"The indictment was returned by the Grand Jury on Monday, October 21, the first day of the term, and the defendants were immediately arraigned. Upon their arraignment, they were asked whether they had counsel, and Grant stated that Major Meyer was his lawyer. The Solicitor thereupon fully informed the Presiding Judge, Hon. A. L. Gaston, of the information given to him by Major Meyer, and Judge Gaston appointed Lewis G. Fultz, Esq., dean of the Berkeley County bar, and Hon. Marion F. Winter, a member of that bar for more than twenty years, and a member of the Legislature from Berkeley County for more than ten years, as counsel to represent the defendants in the cause. (R. 3) Charles Grant, a brother of Alchrist Grant, was in court at the time of the arraignment, and when he asked whether he would have time to see Major Meyer before the trial he was assured by the Solicitor that he would. He was also placed in touch with Messrs. Fultz and Winter by the Solicitor and he conferred with them. Later in the week the Solicitor informed Major Meyer that the trial was set for Friday, October 25th, and Major Meyer informed the Solicitor again that if the defendants were to be tried he would not and did not represent them. (R. 4)

"The case was duly called for trial on the date fixed, and the defendants were represented by Messrs. Fultz and Winter. They were found guilty by the jury without a recommendation to mercy, and were sentenced to death by electrocution. (R. 4)

"After the expiration of the term of court, but before the time for appeal had expired, Jos. Fromberg, Esq., was retained by the families of the defendants, and notice of appeal signed by him and by Messrs. Fultz and Winter was served. (R. 5)

"After the transcript of record was served and agreed to, appellants' counsel served a notice of a motion for a new trial on grounds which, in substance, questioned the sufficiency of the evidence to sustain the convictions, the alleged failure to make effective appointment of counsel for the defendants, the conduct of the defense by the court-appointed lawyers, the failure of Major Meyer to appear for the defendant, Grant, and the validity of the indictment and verdict because there were no negroes on the grand jury and the trial jury panel.

"In support of this motion, an affidavit was made by appellants' counsel which showed that there was only one negro registered in Berkeley County, and affidavits of Charles Grant, Alchrist Grant's brother, and Felix Pinckney, Cyrus Pinckney's first cousin, in which it was stated that Major Meyer had been paid $50 in the case prior to the term of court and the arraignment, and that on the night before the trial he had been paid $500 more, after which Major Meyer said that he was going to work out the case through the jurors, and that he would take care of the situation, and for the family not to go to the trial.

"In opposition to the motion, affidavits were filed by the State from the appropriate officials of Berkeley County in reference to the registration books and the preparation of the jury box for the county.

"Major Meyer was apprised by the Solicitor of the service of this motion and the supporting affidavits, and he delivered to the Solicitor for filing in the cause affidavits made by himself, Miss Polhemus, his secretary, and D. S. Goldberg, Esq., his associate, which affidavits appear in the supplementary record. Major Meyer's affidavit admits the receipt of the $500 referred to in the affidavits in support of the motion, but states that he did not agree to appear at the trial, and so informed the Grants and Pinckneys, and that he went to the jail on the night before the trial and conferred with the defendants, and performed all services which he was paid for and which he agreed to perform,

and that everyone understood, before and after the money was paid, that he was not to appear in the trial.

"The motion was heard by Judge Grimball, and although the term of court had expired and the motion was not one based upon after discovered evidence, he heard and considered it as if it were timely and properly made. He reserved his decision in order to consider the record as made by the agreed transcript as well as the supporting affidavits, and thereafter filed his order dated June 30, 1941, fully discussing the points involved and denying the motion. From this order, notice of appeal was duly served, and a supplementary transcript was served and agreed to."

ARGUMENT

We shall consider the three grounds stated in the petion for the writ of *certiorari* as the reasons relied on for the allowance of the writ.

I

The first ground stated in the writ asserts that qualified Negroes were excluded from the Grand Jury which indicted these petitioners and from the trial panel which convicted them "solely on account of race and color pursuant to established practice and custom in Berkeley County, South Carolina," the county in which petitioners were tried and convicted.

In support of this contention, it is asserted that such exclusion was alleged in the motion for a new trial and that an offer was made to prove it. A similar assertion is made on pages 6 and 7 of the brief filed in support of the petition, where it is stated that petitioners undertook to show systematic and continuing exclusion and discouragement of qualified Negroes from registration as electors, and that the trial Court refused to permit such proof, and again on page 7 that the motion for a new trial was disposed of without affording petitioners an opportunity to prove their allegations that the State election officials prevented them from registration and consequent jury service.

By reference to the motion itself, it will be observed that it consists of a notice of motion, stating the grounds upon which it was based, and affidavits filed in support of the motion. **There was no offer of proof or request for an opportunity to make a further showing.** On the contrary, proof in support of the motion was submitted in the form of an affidavit by the attorney for the petitioners. This affidavit showed that prior to July 1, 1940, only one Negro

had registered in Berkeley County and become a qualified elector; that there were no Negroes on the panel of petit jurors for the term of Court in which the petitioners were tried; that there were no Negroes on the panel of grand jurors for the year 1940, in which they were indicted; and that approximately two-thirds of the population of Berkeley County, according to the 1930 census, was colored.

There was no offer to prove any additional facts and no request for any opportunity to offer further evidence in support of the motion.

Affidavits were filed on behalf of the State showing that there was but one Negro registered at the time that the list of jurors for 1940 was made up, that no Negro has ever been refused registration, that all Negroes who had ever applied for registration had been registered if qualified, and that there had been no exclusion, systematic or otherwise, of Negroes from registration.

Upon the showing made by the affidavits in support of and against the motion, the Circuit Judge before whom the motion for a new trial was made held that there was no evidence tending to show any exclusion from jury service of members of the colored race, and that on the contrary it appeared that the jury list and jury box were made up in the manner provided by law from the qualified electors of the county, who had to be registered in order to be qualified electors, and that the failure of members of the Negro race in Berkeley County to exercise their rights under the valid constitutional provision of the State requiring that jurors be qualified electors, rather than any act of the State or its administrative officials, accounted for the absence from the jury list of all of the members of that race except one in the county. This finding was concurred in by the Supreme Court, which discussed the constitutional and statutory provisions of South Carolina in ref-

erence to the qualification of jurors, and held that there is no evidence in the record even tending to show any illegal exclusion from jury service of any members of the colored race, and that hence the case does not come within the rule of the several decisions cited by counsel.

It was not contended in either the lower Court or the Supreme Court of South Carolina that the constitutional and statutory provisions of the State requiring jurors to be qualified electors were unconstitutional. Actually the provisions are fair, equal, and entirely proper provisions. It is within the province of the Legislature of a State, acting under the constitutional authority possessed by it, to prescribe the qualifications for jurors, and its action in this regard would be invalid only if there were discrimination based upon race or color.

The showing made fails to establish any illegal action by the officials acting under the Constitution and statutes of the State, and relies solely on the absence of Negroes from the registration list and the 1930 census figures as to the white and colored population of the county. If the jury list were by law made up from residents generally, without regard to whether they were qualified electors or not, population figures might be evidence of exclusion by the jury commissioners, as has been found in other decisions. If the showing made had been that there were a large number of colored qualified electors registered and that none appeared on the jury list or on the panel from which the grand and petit juries were chosen, it might be contended that some showing of exclusion had been made. Where, as here, the jurors are by law required to be selected from the list of qualified electors, and the showing is that there was only one Negro registered, the general population figures have no evidentiary value, and the absence of Negroes from the panel could not establish exclusion when there were no

Negro qualified electors who could have been legally included.

It is respectfully submitted that the finding of the Circuit Judge, concurred in by the Supreme Court of South Carolina, is not only supported by the evidence in the record, but was manifestly required by that evidence.

The case is obviously different from *Lane v. Wilson,* 307 U. S., 268, 59 S. Ct., 872, where the legislation itself made an unfair discrimination against Negro citizens "by automatically granting voting privileges for life to the white citizens" who had previously voted, "while subjecting colored citizens to a new burden," as stated by the Court (page 276).

It is also different from the case of *Pierre v. Louisiana,* 306 U. S., 354, 59 S. Ct., 536, in which the showing made by that petitioner was "that there were many Negro citizens of the parish qualified under the laws of Louisiana to serve as Grand or Petit Jurors" (page 359), and in which the evidence showed that the State "acting through its administrative officers had deliberately and systematically excluded Negroes from jury service because of race" (page 357). In that case the jury commissioners were required by the State law in the exercise of their discretion to select names for the general venire from persons qualified to serve, and not from qualified electors or registered electors (pages 359-360).

II

The second ground upon which the petition is based is the assertion that petitioners were denied the benefit of counsel. The contention appears to be that the appointment of counsel by the Court was merely formal, that retained counsel was not forced by the Court to appear and serve, that appointed counsel were not given sufficient time to prepare their defense, that they in fact presented none.

In reference to so-called "retained" counsel, the record shows that such counsel stated that he was not retained to participate in the trial of the case and had not agreed to do so, and that neither the Court nor any of its officials were ever apprised of any payment made to such counsel on the night before the trial date. He states in his affidavit filed in the record that he at no time agreed to appear in the trial, and was not expected to appear in the trial, and the affidavits filed by petitioners do not expressly or seriously question his statement to this effect.

Since petitioners had no counsel retained to appear in their trial, the Court, pursuant to the statutes of South Carolina, appointed counsel whose caliber and qualifications are shown in the record (Record, 3). It is evident from their qualifications that petitioners were afforded the services of able, experienced lawyers, as good as they, or anyone else, could have retained to defend them.

On the motion for a new trial, in the Supreme Court of South Carolina, and in the petition for writ of *certiorari*, their conduct of the defense has been criticized. Both the Circuit Judge who considered the motion and the Supreme Court of South Carolina have given consideration to their conduct of the trial and have approved their handling of the matter. The Circuit Judge said that they conducted the defense in a skillful and workmanlike manner, having due regard for the overwhelming and conclusive evidence presented against the petitioners. Their failure to cross examine certain witnesses has been the subject of comment and criticism, but it is obvious from a reading of the record that the witnesses who were not cross examined either did not identify the petitioners as the guilty parties, or were witnesses from whose cross examination no benefit could be expected by the defendants. Such counsel have received no credit at all, in the attacks made upon them, for

their persistent and able effort to establish, by the cross examination of the proper witnesses for the purpose, a basis for the possible discrediting and exclusion of the confessions made by the defendants. It is respectfully submitted that the record shows that the Court-appointed counsel performed skillfully and well a disagreeable duty which they did not seek, and that they well deserved the statement made by the Circuit Judge in overruling the motion for a new trial.

It is contended that Court-appointed counsel were not given sufficient time to prepare the defense. This contention is based upon the statement of one of the counsel that he did not see how it was possible for anybody to be ready in the few days that they had had. The Supreme Court of South Carolina commented on the fact that the counsel who spoke had appeared on the preceding Wednesday, two days prior to the trial, and had suggested that Friday be fixed for the trial. No showing was made as to what evidence counsel thought they might obtain if they waited. A study of the record discloses clearly that there was no probability that any could be discovered. The so-called "retained counsel," according to the record, saw the defendants the night before the trial at the jail and was working on the case outside of the Court. It can be fairly assumed that, since he had been interested in the case for several months, and since he was still working on it the night before the trial, if there had been any other available evidence it would have been suggested to the Court in some form. **The motion for a new trial was made months later, and did not assert the discovery of any new evidence.**

In the supporting brief, petitioners contend that the case of *Avery v. Alabama,* 308 U. S., 444, is distinguishable from the instant case. It would seem, however, that the greatest difference between that case and the instant case

is that in that case the Court-appointed counsel, who had less time than the Court-appointed counsel in the instant case, filed strong affidavits making a showing as to what they hoped or thought that they might be able to establish if they were given more time, which was not done here. It is respectfully submitted that the instant case on this point is controlled by the decision in *Avery v. Alabama, supra.*

III

The third ground upon which the petition is based asserts that petitioners were convicted solely upon uncorroborated confessions which were extracted by threats and duress.

The attack upon the confessions is based upon what is termed an "intimation" of facts upon which the assertion of duress is predicated. "Grave suspicion" is said to arise as to the methods used to obtain the confessions. Upon these contentions this Court is asked to rule the confessions inadmissible and to grant a new trial.

The Grant confession was made only when he had been confronted first with Hilliard and then with Bailey, the two Negroes who had helped him get home on the night of the crime "before the officers got him (Record, 46). Hilliard and Bailey had been located as the result of the investigation and excellent police work of the officers, and not as the result of any information given to them by Grant (Record, 40, 41, 42). He told them nothing until he saw that the officers had located witnesses who could, as he knew, establish his identity, and then he made a statement which in substance admitted that he was one of the Negroes but denied any criminal responsibility on his part, and placed the whole blame upon Pinckney. The case against Grant consisted practically entirely of the girl's testimony

showing that both of the two men assaulted her, and Grant's admission, when confronted by Hilliard and Bailey, that he was one of the two men who had driven off with her on the night of the crime.

As a result of Grant's statement to the officers, Pinckney, **who was unknown in the matter up to that time,** was arrested, and he immediately admitted his part in the matter. There can be no claim of any duress of any kind in reference to Pinckney's statement. There is neither "intimation" nor "suspicion" of improper methods in connection with his confession.

There is no testimony of any kind that any one or more of the circumstances relied upon by petitioners in attacking the confessions had any part in bringing the confessions about. On the contrary, the testimony clearly shows that none of those things, even if the wildest inference favorable to petitioners were drawn, made Grant admit a single fact. The testimony is clear beyond dispute that it was the production of Hilliard and Bailey alone which made Grant admit that he was one of the men, and even this did not make him admit his part in the crime. This was established by the testimony of the prosecutrix as to what both of the men did. And Pinckney's prompt admission that he was the other man bore out this information given by Grant to the officers.

Grant's statement and Pinckney's arrest resulted from the same good police work which located Hilliard and Bailey, exonerated Edward Grant who, because of the ownership of the car, was under even more suspicion than Alchrist Grant, and brought about the solution of the case. The officers were entitled to commendation for level-headed handling of a brutal crime, and it was their conscientious work, rather than any filial loyalty on the part of Alchrist Grant, which cleared his brother, Edward, of suspicion.

In *Lisenaba v. California*, ... U. S., ..., 62 S. Ct., 280, where actual illegality on the part of the officers was found, the decision of the highest Court of California, on conflicting evidence, that the confession in that case was admissible was affirmed by this Court. In the instant case, where only "intimation" and "suspicion" are urged against the admissibility of the confessions, and where the evidence shows that they were not improperly obtained, that decision would, it is respectfully submitted, appear to be conclusive against petitioners.

CONCLUSION

The appellants in this case were charged with the commission of an unusually brutal and horrifying crime, and upon their trial they were convicted and sentenced to suffer the penalty imposed by the law of the State. As a result of patient and skilled police work their guilt was established beyond any reasonable doubt. They had the services of experienced lawyers, who were leading citizens of the county, in their defense. They were convicted after a fair and impartial trial. Months after their conviction a motion for a new trial was entertained, and the whole record, as well as every new circumstance which could be presented, were considered by an able and experienced Circuit Judge, who overruled the motion, and expressly held that they had had the fair and impartial trial guaranteed to them by the Constitution. There is not the remotest possibility that they, or either of them, could be innocent of the charge for which they stand convicted.

Their conviction has been affirmed by the Supreme Court of South Carolina in a well-considered and able

opinion, and it is respectfully submitted that, under the applicable decisions, the judgment of that Court is correct.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General of South Carolina.

ROBERT McC. FIGG, JR.,
Solicitor of the Ninth Judicial Circuit of South Carolina,
Attorneys for Respondent.

N. N. NEWELL,
Moncks Corner, S. C.,
Of Counsel.